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In the Supreme Court of the United States

OCTOBER TERM, 1979

C. FRED UNDERWOOD, CHLOE UNDERWOOD AND JACK D. CANON, PETITIONERS

v.

THE SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary's determination, sustained by the district court and the court of appeals, that the pumice on petitioners' claims is not "block pumice" within the meaning of 30 U.S.C. 611 is based on a correct reading of that statute.

2. Whether the court of appeals misapplied the substantial evidence standard in its review of the Secretary's resolution of factual issues.

3. Whether the district court erred in basing its decision on the administrative record and motions for summary judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-4) is not reported. The opinion of the district court (Pet. App. A-51 to A-65) is not reported. The opinion of the Interior Board of Land Appeals (Pet. App. A-5 to A-16) is reported at 22 I.B.L.A. 62. The decision of the administrative law judge (Pet. App. A-17 to A-50) is reported at 22 I.B.L.A. 70.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980. A timely petition for rehearing was denied on May 1, 1980 (Pet. App. A-67). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, as amended, 30 U.S.C. 611, provides:

> SEC. 3. No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occuring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in this Act means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

STATEMENT

On July 27, 1973, at the request of the Forest Service in the Department of Agriculture, the Department of the Interior, through its Bureau of Land Management, issued a contest complaint seeking cancellation of petitioners' 10 unpatented placer mining claims. The claims were located on 1,600 acres of public land in Shasta-Trinity National Forest, Siskiyou County, California. The principal mineral of value upon these claims is pumice ranging in size from very fine up to an occasional piece two inches in dimension. Petitioners purchased the claims in 1971, intending to use the pumice to supply their cement factory in Yreka, California.

Following an evidentiary hearing, the administrative law judge sustained the allegations of the complaint (Pet. App. A-17 to A-50), finding that the pumice on the claims was a "common variety material" (*id.* at A-48), that petitioners had not established a "valuable mineral discovery" on the claims prior to July 23, 1955, when Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, as amended, 30 U.S.C. 611 (hereafter "the Common Varieties Act") was enacted, withdrawing from location under the mining laws certain common varieties of minerals including pumice (Pet. App. A-45 to A-49),[1] and that the claims were therefore void (*id.* at A-49). The judge's holding that there had been no valuable mineral discovery before the critical date in 1955 was based on extensive findings (*id.* at A-18 to A-44) concerning the market for pumice and the use made of pumice deposits

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[1]Rights attendant to unpatented mining claims, located pursuant to the federal mining laws, 30 U.S.C. 21 *et seq.*, are described in *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 605-607 & nn. 3-4, 615-616 (1978), and *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 335-336 (1963).

on the claims during the relevant period, which led him to conclude (*id.* at A-45 to A-49) that the record did not show that the pumice could have been marketed at a profit before July 23, 1955.

The Secretary of the Interior, acting through the Interior Board of Land Appeals ("IBLA"), affirmed the decision of the administrative law judge (Pet. App. A-5 to A-16). The IBLA held (*id.* at A-7 to A-12) that the government had made a *prima facie* showing that the pumice was not marketable before the effective date of the Common Varieties Act and that petitioners had not rebutted that showing. The IBLA also (*id.* at A-12 to A-14, A-15 n.2) rejected petitioners' contentions that the pumice on their claims was still locatable under the mining laws because it came within exclusions from the coverage of the Common Varieties Act for pumice having "distinct and special value" and for "so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more." 30 U.S.C. 611. In accordance with an earlier IBLA decision, *United States* v. *Thomas,* 78 I.D. 5, 10 n.3 (1971), the IBLA equated "block pumice" with pumice used for abrasives, and found no evidence that pumice suitable for "scouring blocks" existed on the claims (Pet. App. A-15 n.2); it also noted (*ibid.*) that the contention that the pumice at issue was "block pumice" had not been raised before the administrative law judge.

Petitioners sought judicial review in the United States District Court for the Eastern District of California. On cross-motions for summary judgment, the district court upheld (Pet. App. A-51 to A-65) the IBLA's conclusion that petitioners' claims are void, finding, after a review of the administrative record "in its entirety" (*id.* at A-58), that the conclusion was supported by substantial evidence (*id.* at A-58, A-65).

The court of appeals affirmed (Pet. App. A-1 to A-4), specifically upholding the IBLA's determination of the pre-1955 marketability issue (*id.* at A-2 to A-3) and its conclusions that the pumice on petitioners' claims was not excluded from the coverage of the Common Varieties Act either as pumice having "distinct and special value" or as "block pumice" (*id.* at A-3 to A-4). The court agreed with the IBLA that the latter exclusion was not an exclusion for any type of pumice that is found in pieces of the specified dimension but rather refers to a special kind of pumice, "used in block form as an abrasive," that occurs in pieces of that size (*id.* at A-4).

ARGUMENT

The decision below is correct, conflicts with no decision of this Court or any court of appeals, and presents no issue warranting review by this Court.

1. Petitioners contend (Pet. 16-23) that the court of appeals erred in upholding the agency's reading of the reference in 30 U.S.C. 611 to "so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more" as a reference to a type of pumice that occurs in pieces of the indicated size and that is marketable as an abrasive. They argue that pumice occurring in pieces of that size comes within the exclusion regardless of the use for which it is produced, and that therefore pumice having such dimensions is still a locatable mineral under the mining laws.

The statute contains no definition of the term "block pumice," but its legislative history suggests that it refers to a type of pumice characterized by something in addition to mere size. Thus, the relevant House committee report. states that in excluding "block pumice" from the common varieties category, the committee intended to exclude "a

class of pumice having distinct and special properties." H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955).[2]

The technical literature on pumice indicates that only abrasive grade pumice, which occurs in nature in large chunks or "blocks," has any such distinct and special properties. Thus, in Bureau of Mines Bulletin No. 630, *Mineral Facts and Problems* 736 (1965), pumice is defined as follows:

> Under various conditions pumice competes as a lightweight aggregate with expanded clays and shales, expanded perlite, exfoliated vermiculite, slag, cinders, and diatomite * * *.
>
> *As an abrasive in block form*, pumice competes in the market with brick made from silicon carbide, aluminum oxide, and natural rock such as novaculite and sandstone.
>
> Pumice used as a concrete aggregate, railroad ballast, and for road surfacing is sold in a low price market and must compete with many substitutes. Hence the market area for any deposit is limited by transportation costs and the availability of competitive materials. *As abrasives, pumice sells at a much higher average unit price, transportation is a smaller part of the total cost, and shipments are made over much greater distances. High quality pumice is imported from foreign sources in crude form for processing*

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[2]The statements made by Raymond Halbrook of the American Mining Congress, concerning the block pumice exemption, in the course of the committee hearings on the Act and relied upon by the petitioners (Pet. 19-21) have little weight in comparison with House Report. Statements made by persons not responsible for the drafting of a bill are entitled to little weight. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 204 n.24 (1976); *United States* v. *United Mine Workers*, 330 U.S.258, 276-277 (1947).

domestically for abrasive purposes. [Emphasis added.][3]

On the basis of the House committee report and the relevant technical literature, the Secretary of the Interior, through the IBLA, has reasonably concluded that to come within the exclusion for "block pumice," pumice must be of an abrasive grade. As the court of appeals correctly observed (Pet. App. A-4), an agency's construction of a statute it administers is entitled to great deference. *United States* v. *Rutherford*, 442 U.S. 544, 553-554 (1979); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). Here such deference was entirely appropriate. The agency's reading is consistent with the language of the Act: had Congress intended to allow location under the mining laws of *any* pumice occurring in pieces of the specified size, it would have had no need to add the term "block pumice." And it is consistent with the congressional purpose of permitting continued location of pumice claims only where the pumice has "distinct and special properties," to refuse recognition to claims containing pumice that—as is the case here—is to be produced for the most common uses of that material (see Pet. App. A-12 to A-14, A-35 to A-38).

2. Petitioners also contend (Pet. 23-26) that the court of appeals applied an inappropriate standard of review. Petitioners erroneously suggest (Pet. 23) that the court simply deferred to agency expertise instead of determining whether the decision was supported by substantial

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[3]Similarly in Department of Natural Resources, State of California, Bulletin No. 174, *Pumice, Pumicite and Volcanic Cinders in California* 26-27 (1956) (see Pet. App. A-15 n.2, A-18 to A-19) block pumice is identified as "[p]umice suitable for the manufacture of scouring blocks." Significantly, that bulletin also described places where "block pumice" occurs in Northern California, indicating that it does not exist in the area of petitioners' claims (Pet. App. A-15 n.2).

evidence on the record considered as a whole. In fact, the court of appeals' deferral to the agency was only with regard to its construction of the statute. On the only factual issue raised before it—the question of the marketability of the pumice on the claims before the effective date of the Common Varieties Act—the court determined (Pet. App. A-2) that "[t]he record contains substantial evidence to support the [IBLA's] finding of non-marketability." The district court had applied the same standard in its review of the IBLA decision, reaching its conclusion only after examining the record "in its entirety" (Pet. App. A-58). The conclusion of both courts below that the agency determination was supported by substantial evidence is correct,[4] and further review by this Court would be inappropriate. See *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503 (1951).

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[4]In their argument, petitioners cite no specific error in the court of appeals' assessment of the record, but merely argue (Pet. 23-27) in general terms that the court applied an incorrect standard. In their statement, petitioners suggest (Pet. 8-12, 15) that the agency finding of nonmarketability prior to July 23, 1955, was unsupported by the record because certain evidence showing marketability was ignored. Specifically they mention testimony by two of the petitioners and two other witnesses alleged to have established pre-1955 marketability of the pumice on the claims at issue (Pet. 12) and a 1955 aerial photograph showing that the contested claims had been mined prior to 1955 (Pet. 10-11). But the district court took note of petitioners' witnesses' testimony concerning pre-1955 marketability and observed (Pet. App. A-58) that none "had personal knowledge" on the subject. The IBLA had discounted such testimony for similar reasons (*id.* at A-9 to A-11). The district court also noted (*id.* at A-60) that a government witness had testified that the 1955 photograph indicated that "only limited amounts of pumice had been removed." At bottom petitioners' complaint is that the reviewing courts declined to reverse the IBLA after themselves re-weighing all the evidence, a task that is beyond the proper scope of their review. *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966).

3. Finally, petitioners contend (Pet. 26-27) that the district court erred in deciding the case on summary judgment motions. They did not make this contention in the court of appeals, and there is no reason for this Court to depart here from its customary practice of declining to review issues not raised or resolved in the courts below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, there is no merit to the argument. Petitioners rely on *Nickol* v. *United States*, 501 F. 2d 1389, 1390 (10th Cir. 1974); but the *Nickol* court acknowledged that, as to agency decisions based on evidentiary hearings, judicial review is "limited to an examination of the administrative record to determine if there is substantial evidence to support the agency's determination" and that "additional evidence is not to be admitted." 501 F. 2d at 1390. The court of appeals' essential objection to the use of the summary judgment procedure in that case appeared to be that the district court had failed to write any opinion discussing the record evidence. 501 F. 2d at 1390-1391. Here the district court wrote such an opinion. Since, as noted, the court was not empowered to take evidence and decide the case *de novo*, petitioners have no cause to complain that the case was decided on summary judgment motions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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